Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket 92-52
	)	
Proposals to Reform the Commission's Comparative Broadcast Hearings	)	GEN Docket No. 90-264

Comments of Stephen M. Cilurzo
In Response to Notice of Proposed Rulemaking

Stephen M. Cilurzo respectfully submits the following comments in response to the Notice Of Proposed Rulemaking issued by the FCC (MM Docket No. 97-234) and released on November 26, 1997.

A. Background

1. Case law dating back to 1947 (more than 50 years ago) relied on the Commission's inclination "to prefer an applicant who intends to manage and operate the proposed station personally, rather than to entrust its operation to employees" [Homer Rodeheaver, 12 F.C.C. 301, 307 (1947).

2. The integration preference (the main focus of the Bechtel case) dates back to a policy statement issued in 1965 [see Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965); Anchor Broadcasting Limited Partnership, 7 F.C.C. Rec. 4566, 4569 n.6 (1992)]. The statement declared it "important" for station owners to participate in day-to-day station management. Since 1965 almost every comparative hearing

has relied on that policy statement, as evidenced by the enormous amount case law based on that very issue.

3. However, in Bechtel II, the United States Court of Appeals found that the reliance on an integration preference is arbitrary and capricious, and therefore unlawful (United States Court of Appeals, No. 92-1378, decided on December 17, 1993).

B. Discussion

4. Previously, mutually exclusive applicants for new broadcast stations relied on past case law and the Commission's long standing Integration Policy in comparative hearings. In fact, even after Congress passed the Balanced Budget Act of 1997 and implemented the statutory requirement set forth in section 309(j)(1) that, (except for certain commercial broadcast applications filed before July 1, 1997) auctions must be used to resolve mutually exclusive applications for initial licenses. However, even after the July 1, 1997 (congress imposed deadline), the FCC continued to open new filing windows and received applications on those allocations based on the following FCC issued statement: "Selection of a permittee from a group of acceptable applicants will be by the Comparative Hearing Process"[emphasis added]. See below, full text of CF-39 "WINDOW NOTICE FOR THE FILING OF FM BROADCAST APPLICATIONS" Released: October 6, 1997 the Commission continued to use the following language:

PUBLIC NOTICE
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554
News media information 202/418-0500. Recorded listing of releases and
texts 202/418-2222

WINDOW NOTICE FOR THE FILING OF FM BROADCAST APPLICATIONS

Report No. CF-39 Released: October 6, 1997

NOTICE is hereby given that applications for vacant FM Broadcast allotment(s) listed below may be submitted for filing during the period beginning on the date of release of this Public Notice and ending November 7, 1997 inclusive. Selection of a permittee from a group of acceptable applicants will be by the Comparative Hearing Process. [emphasis added].(Please note that applications filed for these allotments during the window period must specify facilities corresponding to the allotted channel and station class.

CHANNEL	CITY	STATE
235B1	Baker	CA
245A	Lenwood	CA
296A	Vinton	IA
262C1	Wishek	ND
257A	Newcastle	WY

-FCC-

5. The fact is the FCC has made some serious legal errors. Not only in press releases like this, but on informing the public as well. Other than the original freeze order, and GC Docket No. 92-52, Reexamination of the Policy Statement on Comparative Hearings, issued June 20, 1994, the past FCC (under former Chairman Hundt) had been basically silent for nearly 4 years on this issue. Applications have continued to be filed for new stations based on the FCC's own Filing Window Public Notice releases (even as recent as October 6, 1997). The FCC's own 301 form had not been revised and continues to have questions on the application regarding integration (and other criteria) . No where to be found are supplemental instructions or any FCC issued policy statements on the subject, warning applicants of anything, or disclaiming any risk in filing. To the contrary, the FCC has continued to issued it's own official Public Notice's, announcing the opening of Filing Windows and inviting applicants to apply while proclaiming that "acceptable applicants will be by the Comparative Hearing Process". Furthermore, until mid-1997 the subject of comparative hearings was rarely ever the focus of coverage in broadcast trade publications, or in any FCC issued statements. In fact, GC Docket No. 92-52 was lumped into this Notice of Proposed Rulemaking, because the past Hundt

Commission never ever further dealt with the comments they invited and received back in 1994.

C. Estoppel

6. Applicants have always placed significant reliance on the FCC's own statements contained in press releases. Applicants make decisions, file applications, spend money for legal and engineering preparations etc...all in response to FCC's press releases. When an applicant chooses to file on a specific community in a "window" opening announced by the FCC, that applicant places trust and confidence in Commission issued statements, that if not true, might effect decisions made in regards to filing on a particular community.

7. In this regard, in a court of law, the Commission's actions (or lack thereof) would be considered a question of "estoppel". Myself and other applicants were estopped to be denied that that was the policy, because we relied on it (now) to our detriment; i.e. we spent money and time relying on the official statements of the FCC.

D. Subset Applicants

8. In MM Docket No. 97-234, the Commission has identified a small subset of applicants for new stations that have progressed to either an Initial Decision by an ALJ, the former Review Board, or the Commission. In our view, applicants who have progressed to at least an Initial Decision (or more) have expended considerable resources and unreasonable time delays, and in some cases the lost of potential revenues should also be considered as equitable concerns that should warrant the use of comparative hearings for this subset of applicants.

9. As a principal in an application that has progressed to an Initial Decision by an ALJ in July 1993, and was one of the next cases to be heard in the Review Board (when the "Freeze" was implemented in early 1994), and subsequently frozen for the past 4 years...we have expended over $300,000 in legal, engineering, filing fees, hearing fees and other hearing associated costs since the filing window opened in December of 1989. Many attempts to settle with two remaining applicants have failed. Even in light of the past 180 day period when settlements were encouraged, we tried and tried, but have still not been able to settle. Every time the Commission or Congress waves the limits on settlement amounts, it just makes a settlement harder. The amount we have already spent, added to the inflated settlement amounts applicants ask for, equal more money than the value of the station. We could have gone out eight years ago and bought a station for less than the cost of paying off appealing applicants.

10. Furthermore, I have other equitable concerns that should be considered regarding the unreasonable delay in resolving these matters. Not only has this delay (nearly 4 years in our case since the I.D.) caused a substantial loss of potential revenue, but it has caused myself, my partner, and my family considerable stress and mental anguish over the outcome. My family has struggled with the timing of the actual grant, i.e. when would be the best time to move our children to new schools (in the community of service). Almost every business decision I've made for the past 8 years, has always had considerations attached to it, regarding the ultimate out come of our proceeding, and how it effects our family and other family businesses.

11. Therefore, I support and urge the Commission to adopt a provision in the new Rules that allow applicants who have progressed to either an Initial Decision, Review Board Decision, or Commission decision, to be "grandfather- in" under newly revised and adopted rules (not policy statements as was the past authority the Commission relied on).

Any further action should be decided by Comparative Hearings (a modified form which is discussed below). Clearly common sense dictates that applicants on file should be revisited by the same type of procedures that were originally in place throughout to processing of there application, if progressed to a decision prior to the December 17, 1993 issued Bechtel II Court remand. This subset of applicants advanced there applications based on reliance of the rules in place at the time (rules and policies that are also supported by volumes and volumes of case law since 1965).

E. New Rules and Procedures

12. I submit a logical, common sense approach towards adopting new Rules and Procedures for this subset of applicants. Their applications should be handled on a case by case basis, and remained either back to an ALJ or the full Commission for a revised decision. In Bechtel II the primary focus was the Commission's "integration" of ownership and management preference. Specifically, giving a preference to station owners who will participate in the day to day management of the station. In adopting new rules for this special subset, common sense would say remove the integration preference...then re-evaluate each application still in the proceeding, and issue a new revised decision (or Initial Decision whatever the case may be).

13. For example, if all applicants in a particular case all proposed to be 100% integrated into the ownership and management, the Commission (or staff) should evaluate the effect of removing the integration credit and then re-issue a new revised decision, if there would be no change in the out come of the original Decision. Otherwise, if removal of the integration credit would change the outcome of the decision, then it would only be fair to remand the case back to an ALJ, and allow the applicants to file an amendment, based upon revised comparative criteria.

14. The prior Integration credit was based primarily on each principals proposed participation in the management (and whether it will be full time - 40 hrs. per week or part-time - min. 20 hrs. per week). Secondary (and lumped in with Integration) were five other qualitative credit enhancements. I propose the simple logic of striking the integration credit, but keeping qualitative enhancements that were not found unlawful. The enhancements should move up to a new and separate category, each worth a predetermined number of points.

15. Revised Comparative Criteria for this special subset of applicants should be based on a point system. Simply remove any criteria found unlawful by the courts. For example applicants should be judged on the following separate and equally weighted factors:

(a) Broadcast Experience (enhanced by not only the length of the experience, but the areas of expertise and how they relate to the overall success of a new start up broadcast station).

(b) Past Local Residence (enhanced by past civic involvement in the community)

(c) Daytime Preference

(d) Best Practical Service

16. When corporate America has jobs to fill, they start by looking for applicants that have the most experience. Experience is something that can not be faked. There can be no doubt about experience as being a primary success factor.

17. Past local residency is another factor that can lead to success and it also can not be faked. Applicants with a long history in the same community as the proposed station, will be better informed about the community needs and concerns, and will therefore

develop programming that will be responsive to those needs. In addition, applicants with previous residency that have a history of civic involvement in the community will have greater success with a new startup station - i.e. people with civic involvement are often business people and leaders in the community, and the friendships and associations formed in this environment is fundamental to the success of a new station - such as securing advertising contracts early on, since the prospective advertiser already has a relationship with the civicly involved new station owner.

18. A daytimer preference should be maintained since it has never been the subject of legal challenge.

19. When all other factors are equal, the best practical coverage clearly is in the public's best interest.

20. In general, Comparative Hearings also allow the ALJ the insight to view the demeanor of the applicant. Clearly applications have been filed in the past with people who were fronts for the real party in interest. Often those applicants are flushed out in depositions, but I believe it is necessary for the ALJ to view that persons demeanor.

21. Furthermore, the use of Comparative Hearings for new broadcast stations should continue to be used rather than auctions, for all applications on file prior to July 1, 1997. The FCC has the discretion to hold comparative hearing as evidenced by the attached letter from Senator John McCain (dated October 17, 1997). In part, Senator McCain states:

> "The authority to use auctions is permissive, not mandatory. While it is anticipated that the Commission will use auctions, the FCC does retain the ability to settle outstanding cases by comparative hearings if it determines that hearings would better serve the public interest".

F. Other Auction Concerns

22. The responsibility of a broadcaster is great. Community service is the core of local broadcasting. What sets broadcast stations apart from other services that have been (or will be) auctioned, is this community service aspect of broadcasting. With landmoble, cellular, paging and other newly developed subscription based services....the difference is simply that. They are subscription based services. They can better predict the worth of the spectrum being auctioned. Broadcasters however must first be responsive to the community needs, and develop programming that attracts listeners or viewers. Only then can they begin to bring in revenues that will sustain the operation. The auction mandate by Congress was formed on an ill conceived misconception. New broadcast stations (especially those in small markets) take time, dedication and community involvement to make a startup station profitable. Therefore, newly started stations (not yet turning a profit) often don't command the huge resale values reflected in current station trading.

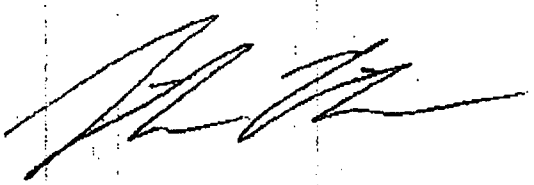
23. Therefore, I contend that applicants who were on file prior to July 1, 1997, but who do not fall into the subset of applicants who's cases have already had an Initial (or other) Decision, should also be decided by a reformed (revised) Comparative Hearing process. Especially since the FCC continued to open new filing windows and received applications on those allocations based on the following FCC issued statement: "Selection of a permittee from a group of acceptable applicants will be by the Comparative Hearing Process"[emphasis added]. Applicants have filed to there detriment with reliance on this statement , i.e. I spent money to file applications based on the statements of the FCC in Window Filing Notices. I might not have filed if I knew the outcome would be determined by auction. Again, in a court of law this would be

considered "estoppel" - I was estopped to be denied that that was policy, because I relied on it to my detriment.

24. In order to satisfy the courts, past policies that are set side, should be transformed into newly adopted rules. Rules that will be the basis and authority under which the Commission processes applications. Not under policy issued statements. Since we have come to learn that FCC issued statements, are not always correct.

25. I urge the FCC to act swiftly and fairly in treating cases that have already passed through the system in good faith, and advanced to at least an Initial Decision under the policies and rules that were in effect at the time. Its is unfair, unjust, and unconscionable to cause this subset of applicants any more delay and expense. In that regard, I would urge the Commission to clear up the back log, starting with the oldest cases, before opening any more filing windows, or proceeding with auctions.

Respectfully Submitted,



Stephen M. Cilurzo
1839 Avenida Flores
Olivenhain, CA 92024

January 24, 1998

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, DC 20510-6125

October 17, 1997

Mr. Stephen Cilurzo
1839 Avenida Flores
Encinitas, CA 92024

Dear Mr. Cilurzo:

Thank you for contacting me regarding Title III of the Balanced Budget Act of 1997, and the comparative hearing process. I appreciate knowing your views on this matter.

Section 3002 of Title III authorizes the Federal Communications Commission (FCC) to select permittees for radio and television licenses by auction. The authority to use auctions is permissive, not mandatory. While it is anticipated that the Commission will use auctions, the FCC does retain the ability to settle outstanding cases by comparative hearings if it determines that hearings would better serve the public interest. Those parties involved in a comparative hearing have until February, 1998 to amicably settle the matter between them.

Spectrum is a valuable public resource, but the public cannot benefit from that resource if it is withheld from use due to the lengthy comparative hearing process at the FCC. Competitive bidding, with the ability of participants to decide the issue among themselves, represents a fair and equitable solution to these delays.

Again, I appreciate the opportunity to be of assistance. Please do not hesitate to contact me in the future regarding this or any other issue of concern.

Sincerely,

JOHN McCAIN
Chairman

JM/kmk